No. 138.
Brief of Browne & Britton for Appellee
Supreme Court of the United States
October Term, 1899
Filed Dec. 2, 1899.
FILED
DEC 2 1899

A. J. DAGGS ET AL.,
APPELLANTS,
v.
THE PHOENIX NATIONAL BANK.

No. 138.

Appeal from the Supreme Court of the Territory of Arizona.

# BRIEF IN OPPOSITION

## TO MOTION SUGGESTING DIMINUTION OF RECORD AND FOR CERTIORARI.

ALDIS B. BROWNE,
ALEX. BRITTON,
*Attorneys for Appellee.*

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1899.

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1899.

A. J. DAGGS ET AL.,
APPELLANTS,
*v.*
THE PHŒNIX NATIONAL BANK.
*No.* 138.

*Appeal from the Supreme Court of the Territory of Arizona.*

## Brief in Opposition to Motion Suggesting Diminution of Record and for Certiorari.

I.

*The motion is too late.*

The appeal was allowed June 6, 1898, and docketed in this Court September 19, 1898. Appellants concede that their formal motion for findings or statement of facts was not filed in the Supreme Court of Arizona until May 31, 1899.

The Act of April 7, 1874 (18 Stats., p. 27), provides that in cases coming by appeal from the Supreme Court of a Territory the findings of fact made by such Supreme Court instead of the evidence at large " shall be made and " certified by the Court below and transmitted to the " Supreme Court, *together with the transcript of the pro-* " *ceedings and judgment or decree.*"

In *Hecht* v. *Boughton*, 105 U. S. 235, 236, the Court held that—

" The facts set forth in the statement, *which must come* " *up with the appeal*, are conclusive upon us."

This rule was reaffirmed in

*Idaho & Oregon Land Co.* v. *Bradbury*, 132 U. S. 509, 513.

*Marshall* v. *Burtis*, 172 U. S. 630, 635.

And by the most liberal practice the power to enter findings after judgment or decree ceases when an appeal is taken.

*North* v. *Peters*, 138 U. S. 271, 283.

After appeal this Court has exclusive jurisdiction over the cause.

*In re Chetwood*, 165 U. S. 443, 456.

The statute of Arizona limits the period for findings or statement of facts in the Trial Court " not exceeding thirty " days after the adjournment of the term."

In *Cohn* v. *Daley*, 174 U. S. 539, 543, the Court ruled such statement or finding filed long after the entry of judgment was not the "statement," &c., required under the Act of April 7, 1874, *supra*, nor could it be regarded as part of the Bill of Exceptions under the Arizona Statute, nor considered as part of the record here. This ruling

has direct application in present case. The motion admits that there are neither findings nor statement of fact made by the Trial Court and accepted by the Supreme Court of the Territory, nor any statement or findings made by the latter Court accompanying the transcript on appeal. It is hence apparent that this Court can do nothing but affirm the judgment.

*Marshall* v. *Burtis, supra.*
*Cohn* v. *Daley, supra.*

And we so ask.

II.

The suggestion of diminution is hence erroneous. There *is* no part of the record which could properly come up with the appeal missing from the transcript to which such writ can run. The appellants ask that matter originating *since* the appeal and docketing of the cause in this Court (and manifestly not in existence or before the Court below prior thereto) be now brought up under writ of *certiorari*. We submit the writ cannot be so used.

III.

Even the findings or statement of facts which the Supreme Court of the Territory has, on November 2, 1899, essayed to make and file is challenged by the appellants. They distinctly ask that the writ now prayed may cover and call for return *inter alia* of "the objections "of the appellants to said statement of facts; also the "statement of facts and bill of exceptions tendered by the "appellants," and presented below long subsequent to the docketing of the cause here. This foreshadows plain purpose to seek in *this* Court review of the testimony and

the statement of facts sought to be made at recent date in the Supreme Court of the Territory. This the plain language of the Act of April 7, 1874, and its settled construction shown by the authorities *supra* wholly forbids. As cumulative authority we add:

*San Pedro, &c., Co.* v. *U. S.*, 146 U. S. 120, 130.

*Haws* v. *Victoria Copper Mining Co.*, 160 U. S. 303, 312.

We submit the motion for *certiorari* should be denied. And, upon its plain admissions, the record herein presenting nothing which can be here reviewed, the judgment below should be now affirmed.

Respectfully submitted.

ALDIS B. BROWNE,
ALEX. BRITTON,
*Attorneys for Appellee.*